THE

DEFORMITY

OF THE

DOCTRINE OF LIBELS,

AND INFORMATIONS *EX OFFICIO*,

WITH A VIEW OF THE

CASE OF THE DEAN OF SAINT ASAPH,

And an Enquiry into the Rights of Jurymen,

IN A

LETTER

TO THE HONOURABLE

THOMAS ERSKINE.

BY M. DAWES, Esq.

———Tenax propositi.

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DOCTRINE OF TITHES,

AND INCONSISTENCY OF THE PRACTICE,

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BY

THOMAS ERSKINE,

BY M. DAWES, ESQ.

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A

LETTER

TO THE HONOURABLE

THOMAS ERSKINE,

&c. &c. &c.

SIR,

AFTER the many able diſcuſſions that have been publiſhed on the ſubject of libels, by men diſtinguiſhed as well for their profeſſional talents as their love of liberty, it may ſeem a work of ſupererogation in me, to add to their number. But as, in my opinion, the writers and ſpeakers, on both ſides the queſtion, have drawn in oppoſite directions, and avoided the medium, by which each would have come to the point, I

know of no opportunity more favorable than the preſent, to fix the public attention on what appears to me, after mature conſideration, to be every way ſophiſtical, deceptive and fallacious, in regard to the doctrine of libels.

And, Sir, favorable as this opportunity is, I feel a pride and a pleaſure, that from the firmneſs of your conduct, as Counſel for the Dean of St. Aſaph, in a proſecution againſt him for the *publication* of a ſuppoſed libel, a field has been opened, in which the unprejudiced and unſhackled may dare to range, unawed by authority, and without the fear of reproach or danger. For you have ſtedfaſtly oppoſed the folly of the conſtruction of a libel, and rendered it additionally ridiculous.

I am old enough in the profeſſion to recollect, with a mixture of pleaſure and pain, almoſt every thing that was ſaid in the caſes of Wilkes, Woodfall, Almon, and Horne;

Horne; and though it would be an indecency which I ſhould be very ſorry to be ſuſpected of, were I to arraign the arguments that were maintained by Counſel againſt thoſe defendants, I cannot help declaring, that it is not their joining in the practice of a court, which only reverberates their words, the former becoming the eccho of the latter, that can defeat their opponents, or make that practice ſhameleſs, in the minds of a free and enlightened people. However fallacious the doctrine of libels may intrinſically be, when examined with care and preciſion, thoſe Counſel whoſe duty it has been to do the moſt in their power for their proſecuting clients, are uncenſurable for having argued agreeably to modern maxims, laid down by the criminal court.

But, regardleſs of their conduct in the caſe of a libel, I mean to unravel the inglorious ſyſtem which has ſo long prevailed, and in an Addreſs to a Gentleman,

who has made himſelf ſo great a maſter of the queſtion ariſing out of it, as you have done, to offer the Public the beſt picture the ſubject affords, of the deformity of that law logic, which, though high-ſounding and technical, diſgraces our freedom, and affrights our underſtandings.

The doctrine of libels was firſt practiced among us in that accurſed court, the Star Chamber, grounded on the principles of the imperial, or more properly called the ſlaviſh law. Nothing appears of it in our books, beyond the days of Elizabeth, and Sir Edward Coke; but enough is ſince to be found in them, down to the trial of the Dean of St. Aſaph, to glut the patience of the moſt moderate reader, and ſicken him with the effects.

Although, in ſome few inſtances, Judges have differed in opinion upon it, ſome contending that proof ſhould be given of the *falſity* and *malice* of the writing, and

publiſhing, before the writer, or publiſher, can be found guilty; others that ſuch proof is unneceſſary, they have uniformly agreed, that the criminality of a libel is *excluſively* in the judgment of the law. In the caſe of the Seven Biſhops, Judge Powell contended for the former, againſt three of his companions; and Judge Holt always, when trying a libel, is ſaid to have aſked the defendant, whether he could prove the *truth* of what he had written. The *truth*, therefore, of the writing, and the *innocence* of the writer, were conſidered by thoſe Judges as an anſwer to the charge, of which a defendant was then entitled to an acquittal. But ſubſequent Judges have held the contrary, inaſmuch that when a Jury have, from *evidence and conviction*, been diſpoſed to find neither *malice* nor *falſity* in the writing publiſhed, they have been told from the Bench, that they had nothing to do with that; for that they were only to find the fact of writing, or publiſhing. Many a man

has

has conſequently been found *guilty* of a libel, though innocent of a *crime*, the language of the verdict being different to the Jury's meaning, that is to ſay, that the defendant *malicioufly* and *ſeditioufly* wrote or publiſhed a certain *falſe*, *wicked* and *ſcandalous* libel againſt the peace, &c. In this way law and fact were divided, though inſeparably blended together, as no fact of publiſhing what is not *falſe* or *malicious*, with an *evil* intent, can be illegal or criminal, except in the judgment of the law, which interdicts a Jury from trying the truth, or falſity, or evil tendency of the writing charged to be a libel, to which the defendant's plea of not guilty, is ſolely directed, and not to the fact of writing or publiſhing, which he is ready to admit on his trial, without giving the Jury the trouble of finding it for him (of which more hereafter.)

This ſeparation of the law from the fact, and the reſervation of the former for the judgment of the criminal court,

with,

with, or without a ſpecial verdict, has long been a convenience to the prevailing Government, to the injury of innocence, and in contempt of truth, with all that ſpeculative knowledge which is calculated to open the minds of men, and pave a way to reformation; but, thank God, violent as this aſſumption of power is, and terrific as it is intended to be, we have not wanted intrepidity to riſk its execution, before Juries who have been wiſe enough to prevent it, by finding the beſt and trueſt of all facts, Not Guilty, in a caſe where no guilt was to be found.

The modern doctrine of libels might have been, in a degree, accountable for in perilous times, while the Judges were dependant. A love of their office, its honors and emoluments; a reigning in fear inſtead of the hearts of the people, might have made them to incline in favor of a court and adminiſtration. But that ſince their independance, and the glorious ſecurity the Revolution eſtabliſhed, they

ſhould continue to do ſo, is alike obſtinate and ſhocking.

As if the prerogative of reſerving the law on libel, or no libel, were matured into a certainty, and never to be altered, we find it laid down in our moſt modern law-books, that with reſpect to its eſſence, it is immaterial whether it be *true or falſe*, it being the *provocation*, and not the *falſity* of it, that makes it criminal, as tending to a breach of the peace *; but as I have never been accuſtomed to take any thing upon credit, on the authority of great names, however ſpecious their arguments, I have conſidered the ſubject in a very different way. Unlike thoſe readers who dip into law-books, and are governed by every thing they read in them, I have never doubted, that if the doctrine of libels were to be ſolemnly attacked, it would be impoſſible to ſupport it.

On

* It is among the errors in that admirable book by Sir W. Blackſtone, that a libel is ſupported with great ingenuity, though contrary to the ſpirit of juſtice.

On all ſides, and according to all our profeſſional breviaries, a libel is defined to be, any writing of an immoral or illegal *tendency* to break the peace. The word libel is only applicable to what tends to do this, which is the reaſon aſſigned by the deluded admirers of the modern doctrine, for making it immaterial whether it be *true* or *falſe*. Accordingly, when the writing, or publiſhing, is proved, the criminal court pronounce its guilt.

Now, it requires no uncommon degree of human ſagacity to ſhew, even under the commonly received definition of a libel, that it is never proved to be ſo on the trial, agreeably to the ſpirit of the definition itſelf. This is ſolely left to the criminal court, who are Judges and Jury alſo upon it; and how, at beſt, any thing can be criminal that only *tends*, and that by mere *diſcretionary conſtruction*, to a breach of the peace, I own I could never conceive. No lawyer in his ſenſes, I believe, has yet, by any ſubtle refine-

ments, deemed mere authorſhip to be an *actual* breach of the peace; and if he think it *tends* to it, from any ſuppoſed provocation, it is ſurprizing we have not more proſecutions for libels than we have, as ſcarce a day paſſes but the preſs is delivered of what, perhaps, in ſome lawyer's brain or other, may be deemed a *provocation*, and, of courſe, a *tendency* to break the peace, and ultimately a libel. The fact is, that mere authorſhip, or publication, is only actionable in a civil ſenſe, between man and man, when ſcandal and defamation are the conſequences. Here is a wrong and an injury *actually done*, without force; without a breach of the peace, or even any other *tendency* to break it, than what, under the idea of *provocation*, whether the words be true or falſe, would make it criminal and libellous, as well as ſcandalous and defamatory. The old common law knew of no remedy for ſlander, or a libel, but a civil one, by ſpecial action for damages, to be found by a Jury. A public libel

was

was a non-entity, and it was not till Richard the Second's time, that the defamation of Peers and great men was puniſhable by Statute. Before then, no mere words were actionable, unleſs accompanied with ſome ſpecial damage; and after a public libel came into faſhion, Lord Coke himſelf tells us, that *ſlander* is no breach of the *bono geſtu*. Though, ſays he, it be a *mediate* provocation for a breach of the peace, it is not *immediately* ſo, like a challenge. The ſame great authority aſſures us further, that *ſedition* cannot be committed by *words*, but by ſome *violent act*. Therefore, unleſs the people ſubmit to any men, or any meaſures, to a degree of paſſive obedience, the reigning notions of libels muſt appear to them arbitrary and oppreſſive.

With reſpect to private ſcandal, the ſame is very properly puniſhable by damages; becauſe, in a ſettled ſtate of Government, under which every free man lives by his *credit* and *good name*, no one ought

ought to injure another by ſlanderous words. We ſhould appeal to juſtice for every wrong done, and not hold the ſcale ourſelves, it being the very eſſence of the civil polity, that juſtice ſhall be equally dealt out, under the voice of the united whole, and not that individuals ſhall aſſume it to themſelves, and vindicate their injuries as in a ſtate of uncivilized nature. But though he exert a laudable right of examining into the merit of Government, or the goodneſs or badneſs of its adminiſtration, if he do it with decency, humility and moderation, the caſe is widely different from the ſlander of a private man. The Government of our Country is in a variety of hands, and to ſpeak of it, however freely, if with a view to preſerve the conſtitution, cannot be criminal towards it, the Miniſters, who are the ſervants of the public, having no right to ſue for puniſhment, when they have received no damage.

However,

However, as the law is clear that truth may be pleaded in bar to a civil action, becauſe there is no defamation in it, though it may *tend*, in its *provocation*, to break the peace, for which it is then thought to be an indictable offence, it appears to me to be indiſputable, any where, but with criminal Judges, and King's Counſel, acting as ſuch, that the truth of the writing ſhould be concluſive, ſince to truth alone do we owe the Revolution, the preſent ſettlement, and all that is dear to us. If the old common-law method of indicting for a libel were, on all occaſions, to be adopted, and a Grand Jury knew their duty, they would be competent to judge whether any given writing were deſtructive of the State's welfare or not; and if alſo the mode of proceeding by information, in the King's Bench, filed by an Attorney General, were entirely deſtroyed, the conſtitution would no longer be diſgraced by it, and every man would reſort to a Grand Jury, as well to puniſh a ſuppoſed libeller of the Government, as of an individual.

Unfortunately, upon the diſſolution of the court of Star Chamber, wherein informations were the ordinary engine, the King's Bench revived their uſe, as the *cuſtos morum* of the nation; but Sir Matthew Hale, who preſided in the former court, was no friend to them, becauſe he knew the ill uſe that had been made of them, by permitting the ſubject to be harraſſed, whenever applied for, by revengeful proſecutors. Yet there uſe remained, even after the ſtat. Ch. I. ſec. 10, which deſtroyed that court, and until the 4 and 5 W. and M. ſec. 18, when, to ſoften the public clamors, it was enacted, that the King's coroner ſhould not file any information, without expreſs direction from the court of King's Bench, and that every proſecutor, permitted to inform, ſhould give 20l. bail, to proſecute with effect, and pay coſts, if defeated or non-proſs'd, unleſs the Judge ſhould certify ſufficient cauſe for proſecuting. Soon after the acceſſion of King William, and notwithſtanding this act, the Attorney General

General was at liberty, in all caſes *againſt the King*, to file his information *ex officio*. So that theſe proceedings, one for offences againſt the King, the other between ſubject and ſubject, have broken in upon the province of a Grand Jury, and rendered their interference altogether unneceſſary, under the ſtrange idea that when the court was *ſufficiently aſſured* that a man had committed an offence, by the Attorney General, which he ſuggeſted *ex mero motu* on the roll, or by the Coroner, by its direction, he was juſtly put upon his traverſe. The Attorney General and Coroner, with the concurrence of the court, thus became ſeparately a Grand Jury, in all criminal caſes not capital, though directly contrary to Magna Charta, which ſays, no man ſhall be adjudged but by his Peers. Sir Matthew Hale informs us, that the moſt regular and ſafe way, and conſonant with Magna Charta, is to profecute criminal caſes by indictment, or preſentment of twelve men *ſworn*: But Sir W. Blackſtone goes fur-

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ther, and referring to Hawkins, p. c. 120, ſays, as to thoſe offences in which informations were allowed, as well as indictments, ſo long as they were confined to this high juriſdiction, and carried on in a legal and regular courſe, in the King's Bench, the ſubject had no reaſon to complain. Certainly a ſubject had no reaſon to complain of what was *legal* and *regular*. It is what is *illegal* and *oppreſſive*, that is obnoxious, and ought to be annulled, ſuch as informations *ex officio*, filed by an Attorney General, who, paying no coſt, has it in his power, at any time, to harraſs a man, by putting him to great expence, and then, for want of evidence, to enter a *nolli proſequi*, as was the caſe, by a certain Vice Chancellor of Oxford.

So flimſy is the word libel, that every writing is charged to be one, in the information by an Attorney General, and the criminal judges claim the power to decide, whether it be ſo or not. The trial, therefore, by a Jury, is only had

for form ſake, ſince, in reality, there is no difference, whether they be impannelled or not, the fact of writing, or publiſhing, ſeldom or ever coming in queſtion, though proved on trial, out of mere ceremony, as a ground for the criminal court to determine, on the face of the record, whether either be criminal, which can as well be done on a demurrer to the information, in every caſe where the fact of writing, or publiſhing, is admitted.

But, after all the miſchief that has been experienced by the doctrine of libels, and informations *ex officio*, it requires only to look into the nature of each, to be ſatisfied that a Jury have a right to determine the one, and that the other is unconſtitutional. We have already ſeen this, in regard to the latter, and I now come to conſider the former, as well in a poſitive, as a relative ſenſe.

The common definition of a crime, I take to be an *act* committed againſt ſome

known law, or rule of right and wrong, accompanied with *a public or a private injury*, for which punishment or redress is prescribed. Where there is no injury, there is no crime. All offences are either civil or criminal. The former between individuals, the latter against the Public. Every injury between man and man, by the spirit of the common law, without any specific description, has its remedy. Every breach of public justice is known and limited, consequently, in every suit or prosecution for an infraction of public or private justice, the fact complained of, or indicted, is first described, and then applied as injurious or criminal, under some general or particular rule of law. As the spirit of the common law, or *lex terræ*, redresses every private injury, so, in virtue of the criminal code, a *crime* must be *committed*, before punishment can be lawfully pronounced. If, for example, a libel were described to be a criminal *act*, either by statute, or known to be so, by antient custom, like the act of extortion,

which

which is criminal by the common law, it would then be puniſhable. But the difficulty to be encountered is, how any writing, or publiſhing, can be deemed ſo, in any ſenſe but a *defamatory* one, for which damages may be recovered. Tho' termed a libel, it is never pretended to have broken the peace, but only that it *tends* to break it, yet we have long heard, *ex cathedra*, that the crime of a libel, or words written, or publiſhed, is the ſole conſideration of the law, though neither the common law, ſtatute law, or *lex terræ*, has deſcribed it criminal.

It is obvious then, that a man is firſt proſecuted for a crime, *un*deſcribed as ſuch by any *poſitive* rule, and when convicted of what he confeſſed on his trial, the writing, or publiſhing, the law then, and not before, conſtrues it criminal, from its mere *tendency* to break the peace, under particular averments; ſo that every *tendency* to break the peace, collected and drawn from ſuch averments, is left to

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the conſideration of the law. Undoubtedly, *preventive* juſtice is of every kind the moſt to be admired, but though its operation be very cenſurably neglected, in all thoſe caſes where the magiſtrate, inſtead of keeping a watchful eye on the idle and vagrant ſubject, according to the ſpirit of the law, eſtabliſhed as well for the good of the able and impotent poor, as the community at large, it is notorious that ſuch preventive juſtice cannot take place at all, in a caſe where there is no guilt, or at moſt, where the only guilt is a *tendency* to break the peace, in the conſtruction of the criminal Judge, who conſiders it, not *jus diſcere*, but *jus dare*, as a miſdemeanor, there being no *overt* act committed againſt Government, to conſtitute it treaſon, the higheſt offence in civil ſociety; and becauſe there is no act, that ideal creature of the criminal law, a libeller, is puniſhed for nothing, unlike every other delinquent in miſdemeanors, who are never puniſhed but for ſome act wilfully done.

Arſon,

Arſon, for example, is an offence againſt the poſſeſſion of another, by burning down his property; but if a man burn his own, ſo as palpably to endanger his neighbour's, the criminal *intent* is drawn from the act itſelf, and being unlawful, all its conſequences are the ſame. It is otherwiſe, if that property be ſo ſituated, that ſuch unlawful conſequences cannot ariſe, becauſe a man may do what he will with his own, ſo as he do not injure another. Therefore, though it be not arſon to burn one's own, the law claſſes it among miſdemeanors, when the ſituation of it is ſuch, as the original burning of it, *wilfully, may* burn the property of another near it, whether it do, or do not. Now, here is an act done to conſtitute it a miſdemeanor; while a convicted libeller has done no act whatever, but of writing, or publiſhing.

In a civil ſenſe, an *aſſault* without a battery, is actionable; but in criminal matters,

ters, the peace muſt firſt be broken, or in poſitive danger of being ſo, by *ſolemn oath*, before the magiſtrate can exact ſecurity for keeping it, by way of prevention; and in the caſe of vagrancy, the ſuſpected vagrant cannot be deprived of his liberty, unleſs, on his apprehenſion, he be unable to give a lawful account of his way of living. It ſhould ſeem, therefore, for a moment, that a Jury, not being magiſtrates, cannot try a *tendency* to break the peace, becauſe they cannot demand ſecurity for keeping it. How prepoſterous then, does the doctrine of libels appear: First, They are not known to the common or ſtatute law, nor prohibited as a *ſpecific crime*. Second, Their criminality, which conſiſts only in *tendency*, is the ſole conſideration of the law. Third, The law, in conſidering them thus criminal, puniſhes a man for what he has *not* done, namely, an act of open violence. Fourth, If the Jury conſider their *tendency* to break the peace, it is *not* within their province. And laſtly, If they

they do not conſider the writing publiſhed as *harmleſs*, they, under all the averments, leave a man to the mercy of the criminal court. For by finding only the fact of writing, or publiſhing, they find him guilty of what is not criminal, and he is puniſhed in return, notwithſtanding the truth of his plea of not guilty, which goes wholly to the criminal charges in the indictment, and not to the fact of writing, or publiſhing.

If, nevertheleſs, it be aſked, what a Jury ſhould conſider and find, in a caſe of this ſort, I ſhould anſwer, that if upon a full review of the writing, they ſhould be of opinion it is *well intended*, and that it contains nothing *infamous*, *falſe*, *malicious*, or *ſcandalous*, they ſhould find not guilty, without any conſideration on *the tendency to break the peace, or otherwiſe*. Their general verdict of not guilty, acquits the defendant of the charge indicted, that is to ſay, that he did not write, or publiſh, any thing *falſely*, *ma-*

liciouſly, or againſt the peace, notwithſtanding the averments may charge the contrary. If they have a right to find a general verdict (and there is no law to the contrary) a verdict of not guilty, means that the defendant did not write, or publiſh, with an *evil* intent, or the intent ſtated in the indictment, which, on the contrary, being entirely before them for trial, if they find him guilty, they find him criminal, in manner and form as charged; and it is not in the power of the King's Bench afterwards to determine him to be otherwiſe, becauſe the determination of the Jury is full and concluſive. It finds the fact and crime, ſuch as it is, namely, a malicious and ſcandalous falſehood, written andpubliſhed with an evil tinent, which can never be proved by witneſſes. Facts only are admitted to be proved, and the Judge and *Jury* are from thoſe facts to determine, with what intention they committed. But as my Lord Hardwicke ſaid, in 1736, on a certain ſmuggling bill, no Judge or Jury can ever, by

our

our laws, ſuppoſe, much leſs determine, that an action, innocent and indifferent in itſelf, was attended with a criminal or malicious intention. One of the great barriers for the liberty of the people is, that every man is preſumed innocent, till the contrary appear by ſome open act of his own, and that act muſt be in itſelf unlawful, and of ſuch a nature, that no innocent conſtruction can be put upon it. In our laws, we have no ſuch thing as a crime by implication, from whence, as the guilt of a libel is wholly implied, under the conſideration of mere tendency to break the peace, where the thing itſelf is innocent and indifferent, a writing, unleſs falſe, malicious, and miſchievous, is on crime at all.

In an action for words, it is poſſible a Jury may find for the plaintiff, with damages, and that their verdict ſhall not be good, becauſe the words, by law, may not be actionable. Here the law conſiders the injury, while crimes are, or ought

to be marked out, ſo that the law ſhould accompany the fact, and go to a Jury, who, in all caſes, civil as well as criminal, have an inherent right to find a ſpecial verdict, if they pleaſe, whenever they doubt that the fact and law do not correſpond. The matter in iſſue is, whether a defendant is, or is not guilty, in manner and form as he is indicted, and this the Jury are ſworn to try. But when it is of ſuch a nature, as no action, indictment, or information, will lie for it ſingly, and it is worked up, by *aggravations*, into a crime, ſuch as, a paper was written, or publiſhed, with *intent* to raiſe tumult, which is never aſſerted to have *broken*, but only to be *againſt* the peace, then ſome *overt* act ſhould be proved, otherwiſe the Jury are bound to find the defendant not guilty *.

Mr. Bearcroft, that honeſt and candid lawyer, whoſe conduct, in the cauſe againſt

* See Mr. Hawles' Treatiſe on the Duty of Petty Juries.

againſt the Dean, as on every other occaſion, does him honour, ſaid almoſt as much as this in declaring, while ſhewing cauſe againſt a new trial, that the Jury had a right to find a general verdict. If they have, and no one, in propriety of ſpeech, can deny it, the implication is, that by finding not guilty, they blend law and fact together, and ſay the defendant is innocent of all the criminal part of the charge. They *deny the guilt*, though the fact of publiſhing be *proved*, which they would not do, but in a caſe where no crime is committed. By finding a general verdict of not guilty, they do no more than what Mr. Bearcroft, and Mr. Juſtice Willes after him, ſaid they had a right to do, notwithſtanding the former gentleman, on the Dean's trial, urged, by a kind of contradiction, that the law and fact were diſtinct in a libel, as much ſo as on the trial of an ejectment, where he juſtly inſtanced, that a Jury had nothing to do with the operation of a fine, in the deduction of a title. An ejectment is a

treſpaſs,

treſpaſs, and not a crime. On the trial of all civil injuries, a Jury have only to find the wrong, and give damages for it; but on the trial of all crimes, they are to find them committed, or acquit the defendants. Every crime is a fact, and every day's experience convinces us, that for new crimes, of human inſtitution, a Jury are often obliged to find ſpecially, becauſe a doubt is ſtarted to them by the criminal Judge, whether the facts proved amount to the crime prohibited by law, which is then free to conſider how far they do, or do not, independent of the Jury, who diſcharge their conſciences by finding the facts proved only.

I flatter myſelf, I need ſay no more, in proof that a Jury have a right to conſider the inuendos and averments, and determine, libel or no libel, on a general verdict, as much ſo as they have to find homicide murder, where the *intent* to kill is manifeſted to them by ſome act; and this right ought never to be given up, but with our lateſt breath.

Let what will be ſaid to the contrary, I am too intractable to think that the queſtion of libel, under every inuendo and averment, does not wholly remain with the Jury, who are entitled to judge whether a paper be *reſpectful*, *innocent*, *candid*, *decent*, *inſtructive*, *true*, and *conſtitutional*, however ſpeculative, independent of any conſtructive tendency to break the peace, which, for reaſons already given, is no crime at all, notwithſtanding what any criminal Judge may otherwiſe ſay, who, I am ſorry to think, is too ready to warp and twiſt the plain letter of the law, to accommodate it to the inclination of every public proſecutor, inſtead of diſpenſing juſtice, regardleſs of party or politics.

Judges are bound, by oath, to determine according to the *known laws* and *ancient cuſtoms* of the realm, practiſed *time immemorial*, but no law or cuſtom exiſts, that conſtitutes a libel criminal. It is a badge of ſlavery, and a creature of

of a Judge's diſcretion, which is little ſhort of tyranny. As ſuch, it is devoutly to be wiſhed that Juries would always exert their acknowledged right of finding a general verdict of not guilty, where no crime appears, and that Parliament would interpoſe its authority, to deſtroy informations *ex officio*, as it did on the miſfeaſance of two Chief Juſtices (Keeling and Scroggs *) the one for refuſing a verdict of manſlaughter, on a trial for murder, given becauſe there was no *malice prepenſe proved*, the other for diſcharging a Grand Jury, before they had done their buſineſs. Parliament voted the conduct of theſe men illegal, as it likewiſe did, in the caſe of one Topham, a ſervant of the Houſe of Commons, whoſe plea, that he acted by their order, had been over-ruled; and having interpoſed thus, in caſes where the *known* law was infringed by the Judges, they are loudly called upon to cure the evil of informations *ex officio*, by their entire deſtruction.

* See Parliamentary Debates, 1680.

But, anxious as I am to ſee an event of this kind take place, I would by no means have it underſtood, that though I think all free enquiry ſhould be encouraged, in politics, as well as very other branch of knowledge, Government ſhould not be ſecured againſt its licentiouſneſs. Were any Duke's brother, for inſtance, to write and publiſh a pamphlet, ſetting forth, that the Houſe of Hanover were uſurpers of the Crown of Great Britain, and were enemies to Church and State, as by law eſtabliſhed, ſo as immediately to call forth the people to arms, in favor of a pretender. Or if any Ex-Miniſter, from principle, revenge, or diſappointment, ſhould be raſh enough to circulate, by means of the preſs, that the exiſting Government were an inſult to the common ſenſe of freemen, and a violation of all the rules of public right, as reſerved in the great plan of the Engliſh conſtitution—I ſay, if a leading character were to write and publiſh any thing ſo inflammatory in itſelf, as to induce a tumult,

and an open oppoſition to all good order, peace, and common ſafety, the falſity and malice of it would be ſo palpable, on the firſt bluſh, as tried by the true principles of the conſtitution, and the Revolution, that all who runs may read—and from this falſity and malice, from ſuch a character, may proceed acts of downright rebellion and treaſon. But neither in the caſe of Wilkes, Woodfall, Almon or Horne, did I perceive any thing had been written, or publiſhed, by any leading character, *falſely* or *maliciouſly*, ſo as *immediately* to induce an inevitable inſurrection. The North Briton, to be ſure, was an attack upon a King's *ſpeech*, penned by a Miniſter, who felt the laſh of it, and reſented it. Junius' Letter was a bold piece of declamation, containing too much truth, but expreſſed with too much familiarity. An Attorney General, therefore, as a ſort of guardian of the Royal honor, ſtepped forward, armed with that breaſt-plate of hope, an information *ex officio*, and in the ſaving faith of the law's exclu-

ſive conſideration, that ſuch letter was a libel, he brought the publiſhers to trial, though without effect, the Jury having negatived the inuendos and averments in the criminal charges, by finding guilty of publiſhing *only*; and as to the ſimple advertiſement for a ſubſcription in favor of a few American orphans and widows, though very provoking to thoſe Miniſters who quitted their poſts with our loſs of America, and an abundance of treaſure and blood, it neither drew the attention of the people, nor, of courſe, tended to do any public harm. The great miſtake of men, in giving their opinions on libels, ariſes from a nice diſcrimination of theſe particulars. Though ſome writings and publications may be productive of public calamity, that no common reader can miſunderſtand them, their falſity and malice being ſo conſpicuous, it follows not that others, innocent and indifferent in themſelves with the people, however provoking to a Miniſter, are equally reprehenſible, and I defy any man, fond as

he may be of the commonly received opinion of libels, to give an inſtance, when any writing, or publication, produced, or was even likely, by a common poſſibility, to produce tumult, diſorder, or violence, except in the *apprehenſion* of thoſe who found a gratification in the proſecution of the writer, or publiſher. The truth is, that nine times in ten, a paper is only criminal in the apprehenſion of the Miniſter, or the Attorney General, who, countenanced by the ſupreme criminal court, truſts in the conviction of a man for writing, or publiſhing it, to puniſh him for ſtepping between the governors and the governed, whoſe ſervants they are, and making their conduct known for what it really is, and not for having, falſely or maliciouſly, alarmed the public fear of danger. If nothing be ever found fault with, nothing will ever be amended. By the ſame rule, if the conduct of Miniſters ſhould for ever paſs *ſub ſilentio*, the acquieſcence of the people will in time lull them into ſlavery.

To

To their watchfulneſs, aſſiſted by the true friends of the conſtitution, do we owe all the bleſſings of our preſent liberty. Why then ſhould an Attorney General, or any enterprizer in his fervors to favor a party, contend, and there are many, otherwiſe able and ingenious men, who do contend, that every paper, taken up as a public libel, deſerves the name of criminal, from its mere, though remote tendency to break the peace? As no proof can poſſibly be brought of this, I could wiſh never more to hear any Lawyer, young or old, talk of *tendency* as an evil, but that every one will be honeſt enough to own, that their can be neither crime or miſdemeanor without an act, ſuperinduced by an evil and wilful intention. To guard gainſt the commiſſion of crimes, by making mankind better by precept and example, is commendable; but to curb the liberty of the human intellect, to limit human actions, to reſtrain the human thoughts from being otherwiſe publiſhed than by the faculty

faculty of ſpeech, and to prevent the developement of our underſtandings, for the laudable purpoſe of benefitting mankind, in all the ſciences of the diſcovered world, is infamous and deſpotic. Wiſdom and virtue are often drawn from error and vice. But if the Magiſtrate, the Miniſter, or the Attorney General, are to be the arbiters of our very thoughts, words, and writings, as well as actions, it were high time to leave off thinking, and look out for another ſyſtem of *jure divino* government, and conſider its Miniſters perfect and infallible

At all events, I would have no Grand Jury ſuffer an inflammatory falſehood to paſs, unfound by them, as a miſdemeanor which *ought* to be puniſhed. The line I mean to draw is, that Judges ſhall in no caſe be left to their diſcretion, but, in the meaſure of puniſhment. Judge, Juror, and Executioner, are characters only conſolidated in a tyrant. Wretched, therefore, may

may the people of England expect to be, if ever they ſuffer themſelves to be deprived of the right of finding, by a general verdict, as jurors, the guilt, that is, the criminality or innocence of any paper, proſecuted under the uſurped title of a crime. The Houſe of Commons is the place where their complaints ſhould be made againſt informations *ex officio*, which, though a motion in it to aboliſh them in 1766, was negatived, may ſooner or later be brought to a ſenſe of annihilating them, leſt injuries of a greater magnitude ſhould ſucceed the frequency of their uſe.

And now, Sir, having held up the deformity, as well of the doctrine of libels, as of informations *ex officio*, which I hope time will correct, give me leave to congratulate you on the ſucceſs of your laudable zeal, and profeſſional exertions, in the cauſe of the Dean. They have brought forth a fact of ſome importance,

portance, in a declaration from the criminal ſeat of juſtice, and from the lips of a King's Counſel, acting in favor of a criminal proſecution, that a Jury, on the trial of a libel, have a right to find a general verdict, which, I am of opinion, is as much as to ſay, if they acquit a defendant, they have a right ſo to do, although the fact of writing, or publiſhing, be on all ſides admitted.

I am, Sir,

Your moſt obedient ſervant,

M. DAWES.

29*th November*, 1784.

E R R A T A.

Page 10. line 13 for *on* the read *or*.
14 — 10 for *be* exert read *we*.
ib. — 13 for if *he* do read *we*.